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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the California Apartment Association respectfully submits this brief amicus curiae in support of appellants, Alexandra Fisher, et al. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the clerk of this Court.

Amicus curiae California Apartment Association is a nonprofit association which represents the interests of the more than 352,000 owners of residential rental property in California. These owners, a majority of whom have their savings invested

in modest holdings of four units or less, provide shelter for over 4 million households in the State of California. A great many of these owners have seen in recent years the imposition without state sanction of severe local rent controls which have devastated their investment-backed expectations of both profitability and marketability. As a result, the expansion of this industry—and of the housing supply and other industries related thereto—has been virtually frozen in rent-controlled California cities. Growth has also been substantially impaired in uncontrolled areas due to the reasonable fears of investors that increasing numbers of politicians will discover that the cheapest way to subsidize housing costs and thereby curry the favor of renter constituents is to abandon the free market in favor of price regulation.

The California Apartment Association has played a principal role below in the presentation of the antitrust challenge now made in this Court, and appears herein to urge the Court to acknowledge jurisdiction herein and afford plenary consideration to the sweeping revisions of federal law enunciated by the state court below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The clear intent of Congress and the rule repeatedly propounded by this Court is that, unless engaged in "state action"—an implementation of a clearly articulated and affirmatively expressed *state* policy of displacing competition with regulation in the affected industry—local governments are subject to the federal antitrust laws. This case presents for review the first decision known to amicus curiae which significantly delves into the issue of whether price-fixing conduct which admittedly would be *per se* actionable if engaged in by private parties is somehow validated *because* of the governmental status of the price-fixing participants.

The opinion below (Appendix A to the Jurisdictional Statement) would cause great confusion and conflict as *stare decisis*. Not limited in its reasoning to rent controls or even to the application of the antitrust laws, it strikes deep at the heart

of long-settled principles of preemption. It finds, strikingly, that local action which obstructs the policies and objectives of express congressional action nonetheless is not preempted. Rather, in effect, it holds that local action may itself preempt that federal law by making it a crime to engage in the independent pricing encouraged by federal law. This ability of cities, without state policy backing, to reach out and fix prices in the market is not limited to rents, but could be applied to any and all commodities and services the city chooses to control.

What remains of the basic principle enunciated by this Court of insulating national economic policy from "parochial interests," if a city is free to adopt a totally controlled economy as a "reasonable" pursuit of its "health, safety and welfare" objectives? If the public welfare objective *is* the involuntary lowering and freezing of price, what means could be "less intrusive" upon the federal policy favoring price competition, and still accomplish the objective of freezing and stabilizing prices? None, obviously, which is why we respectfully suggest that the opinion below is nothing less than an effort to undermine, circumvent and, in effect, overrule this Court's rulings in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Company, Inc. v. City of Boulder*, 455 U.S. 40 (1982); and *Town of Hallie v. City of Eau Claire*, No. 82-1832, ____ U.S. ____, 53 U.S.L.W. 4418 (1985).

According to our research, California is the only state in the Nation where, despite the fact that the adherents of rent control have failed to obtain state action authorizing local rent control, some cities persist in controlling rents under a "home rule" police power such as that found inadequate in *Boulder, supra*. The court below has acknowledged that "California has no rent control statute." 37 Cal.3d at 655, Appendix A at A-6. The question presented and needful of plenary consideration is whether some new exemption or immunity flows automatically from municipal status, whether one attaches to it the euphemisms "municipal rule of reason," "public welfare defense," or some other.

With this Court's recent decision in *Town of Hallie v. City of Eau Claire*, No. 82-1832, ____ U.S. ____, 53 U.S.L.W. 4418 (1985), and the Congress' recent enactment of the Local Government Antitrust Act of 1984, P.L. 98-544, there has begun to evolve a clarity and consistency in this area of the law that is ignored by the court below.[1] Unless affirmatively addressed by this Court, the opinion below in this case threatens, in its ill-perceived need to "wander off the map and travel cross country without the benefit of trail or compass," 37 Cal.3d at 663, Appendix A at A-15, to muddy those waters again. *All* parties to this controversy agree, it would seem, that uncertainty in this area of the law is destructive to the interests of both federal and local objectives as well as, we submit, the rights of private competitors to be free from predatory municipal activity. We respectfully suggest that the time to address the other half of the question, that of substantive conflict with the Sherman Act, has arrived.

ARGUMENT

I. FAILURE TO AFFORD PLENARY CONSIDERATION TO THIS APPEAL WILL HAVE DISASTROUS EFFECTS IN THE LOWER COURTS

In its opinion below the California Supreme Court has declared sweeping revisions to the Constitution and laws of the United States to save from certain preemption the parochial interests of the City of Berkeley. In one bold move the court below has discovered constitutional truths that have thus far evaded this Court, despite the substantially greater experience and authority traditionally enjoyed by this Court in that role. The Supremacy Clause, we are told, does not operate to preempt municipal anticompetitive action notwithstanding the absence of sovereign state action. To the contrary, the parochial municipal policy may shoulder aside the Nation's economic policies embodied in the Sherman Act—the "utmost extent" of congressional commerce power, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944)—provided the

[1] Indeed, the California court failed even to acknowledge the 1984 Congressional action. *cf.* 37 Cal.3d at 672, Appendix A at A-27.

local program is "even-handed," and its challengers cannot demonstrate to the court a "less intrusive" yet equally "effective" means of accomplishing the local goal.

The linear approach of direct preemption used by this Court where an express congressional commerce act is obstructed by a local act is now replaced, we are told, with a variation upon this Court's "negative implications" test heretofore used only in cases of local regulation of a commerce aspect *upon which Congress has not yet acted. See, e.g., Edgar v. MITE Corp*, 457 U.S. 624 (1982); *Kassel v. Consolidated Freightways Corp*, 450 U.S. 662 (1981). But even *that* test apparently favors federal policy too much in the view of the California court, for balancing federal interests against local policy is pernicious and dispensable; courts are incompetent to balance local social policy against federal economic policy (opinion below, 37 Cal.3d at 675) and we should not suffer "judicial second-guessing of legitimate local policies." *Id.*, at 675, n.28. The solution offered by the California court is a rule that would in virtually all cases hold municipal policy absolutely "supreme" to federal law. We respectfully submit that judicial second-guessing of *federal* economic policy is the result ultimately reached by the California court.

Approval by this Court of such radical changes to the constitutional law of preemption would arguably be the most historic—and regrettable—commerce decision ever issued by this Court. All of the lower courts of this Nation would be required to totally readjust their view of Congressional power under the Commerce Clause in light of the new impotence imposed thereon by this radical opinion, which reaches not merely rent control nor merely municipal antitrust issues, but indeed the very heart of federalism and the commerce power, and all the varied manifestations thereof.

Yet it is too late to avoid such a result by any means other than plenary consideration of this appeal. Under the rule of *Hicks v. Miranda*, 422 U.S. 332 (1975), summary disposition of this case would *necessarily* be *stare decisis* as a decision on the merits of this appeal.

The choice facing this Court in this appeal is clear: either reject the erroneous California decision by giving plenary consideration to the issues raised in this appeal, thereby continuing the vitality and meaning of the *Boulder* tests of clear articulation and affirmative expression, or summarily dismiss this appeal, effectively adopting the California Supreme Court's opinion as its own. If the latter course is taken it will be abysmally obscure to the Nation's trial courts just what this Court intended to make law by its summary action. *See Colorado Springs Amusements, Ltd. v. Rizzo,* 428 U.S. 913, 916-922 (1976) (Brennan, J., dissenting). Such confusion on such a pervasive and important range of issues should not be invoked without good cause.

II. PREEMPTION BY THE SHERMAN ACT IS A QUESTION OF COMPETITIVE IMPACT RATHER THAN MUNICIPAL POLITICS

The political status of municipal actors, now unquestioned to be "persons" under the Sherman Act, *Lafayette,* 435 U.S. at 396, is now well-settled as to the state action exemption. As this Court so recently stated in *Town of Hallie, supra:*

> Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 412 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.,* at 413. [*Town of Hallie, supra,* 53 U.S.L.W. at 4419.]

Further, where municipal regulation of private market participants is involved, active state supervision of the scheme must be shown. *Id.,* 53 U.S.L.W. at 4421, n.10. As the California Supreme Court has acknowledged herein, "California has no rent control statute," Opinion below, 37 Cal.3d at 655, Appendix A at A-6; "It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less 'clearly articulated and affirmatively expressed' any policy favoring local ordinances such as Berkeley's." 37 Cal.3d at 714, Appendix A at A-82 (Lucas, J., dissenting). The market restraint, then, stands before this Court bereft of a single shred of sovereign policy to defend it; rather, its defense turns exclusively upon a presumption created by the court below that the municipal status of the price-fixer transforms the act into something other than price-fixing.

The status of cities as such, in *preemption* analysis, is irrelevant. Here we have an express Congressional enactment under the Commerce Clause. Indeed, Congress "exercise[d] all the power it possessed" under the Commerce Clause with the Sherman Act. *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97, 111 (1980). In *Lafayette,* this Court noted that the Congress intended to establish competition as "the polestar" of economic affairs, shielded from "the vagaries of the political process," so that free enterprise could flourish "without regard to the amount of influence it might have with local or state legislatures." *Lafayette,* 435 U.S. at 406-407. Yet the opinion below holds that by local political choice this national policy may be discarded with impunity, irrespective of the absence of state policy or involvement.

Well-settled law of preemption dictates that a local or state enactment conflicting with or obstructing express federal policy must be held invalid. The requisite conflict may be facial and obvious, or it may be demonstrated where, despite the lack of obvious conflict, the state or local program tends to thwart the objectives or policies of federal law. *Hines v. Davidowitz,* 312 U.S. 52 (1941). As stated by Professor Laurence H. Tribe:

> [S]tate and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie

> federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. [Tribe, *American Constitutional Law* (1978) section 6-24.]

Here we have a Congressional Act specifically designed to foster free market activity and particularly aimed at freedom in pricing. As this Court stated in *Midcal, supra:*

> The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.
>
> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S.596, 610, 892 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972) . . . .

[445 U.S. at 110-111.]

The importance of independent price-setting to that policy is beyond dispute:

> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [*U.S. v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 226 n.59.]

In contrast, we have an ordinance by the city of Berkeley which makes "the setting of price by free market forces" a *crime.* How could one conceivably say no "conflict" exists? For the California Supreme Court, the answer to the question is to reintroduce "status" into the *substantive* issue of conflict. This Court and the Congress having both declared that municipal status alone cannot confer *exemption,* the lower court herein has confused the *preemption* issue by indulging the pretense that

"conflict" does not exist so long as the ordinance passes its new-found *political* test. The *economic* issues of antitrust analysis are seemingly irrelevant in finding conflict —instead, whether price-fixing conflicts with the "Magna Carta of free enterprise" is to be determined upon *political* issues of municipal status, health and welfare objective, and so forth. Stripped of its pretensions, this new test of "conflict" is in reality a localized *Nebbia v. New York,* 291 U.S. 502 (1934), warmed over—and totally insensitive to the economic policy of the Sherman Act.

The question whether the Congress intended to tolerate conduct by municipalities which would be unlawful if engaged in by private parties has been answered by the Congress itself—in the negative. Congress has refused to grant the blanket exemption sought by the cities following this Court's *Boulder* decision. *See generally* House Judiciary Committee Report on the Local Government Antitrust Act of 1984, H.R. Report 98-965, 98th Cong., 2d Sess. (1984).

III. IF MUNICIPAL PRICE-FIXING DOES NOT CONFLICT WITH THE SHERMAN ACT, WHAT DOES?

The essence of the line of cases running from *Parker v. Brown,* 317 U.S. 341 (1943), through *Lafayette* and *Boulder* to *Town of Hallie* is that *states* are permitted to make the choice to displace competition with regulation, but cities are not. The reasoning is straightforward enough: we could not have an effective national economic policy if each city and county had its own insular economic system, ranging from laissez-faire capitalism to the controlled economy idealized by some California municipal activists. As this Court succinctly stated in *Lafayette:*

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." [435 U.S. at 412-413 (footnote omitted; citations omitted).]

This court also pointed out in *Lafayette* that the test enunciated therein struck a desirable balance between state and federal interests because it

> "[P]reserv[ed] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." [*Id.*, at 415-416.]

Now the California court has devised a test which, unless denied *stare decisis* effect by plenary consideration herein, radically changes the balance between federal and municipal power. In the total absence of any *state* policy to command federalist deference, even the most egregiously anticompetitive local experiment—e.g., an across-the-board price rollback and freeze on *all* consumer goods and services—is exempt from antitrust analysis so long as the private litigant cannot prove an equally effective yet "less intrusive" means is theoretically available. Yet, assuming that "effective" contemplates "cost-effective," as it necessarily must, what could be more cost-effective than printing an ordinance and thereby conferring upon voters a short-term savings of hundreds of thousands or millions of dollars in the aggregate, with no cost beyond typing the ordinance and signing it? Here, if the objective is less expensive housing, the familiar means of direct subsidy and supply is "less intrusive." This was argued before the court below but was ignored by the majority—perhaps because, although quite "effective," it takes money. *See* opinion below, 37 Cal.3d at 718, Appendix A at A-86 (Lucas, J., dissenting). The court below has fashioned a test that will exempt from antitrust scrutiny all forms of municipal price-fixing, for *nothing* so effectively gives voters the desired budgetary relief as simply making it a crime to operate a business at prices producing profit margins above the survival level—which in essence is the result of the price-fixing ordinance before this Court.

A. Congress Intended to Preempt Municipal Anticompetitive Acts.

Until recently, the question of whether and under what circumstances Congress intended to preempt the anticompetitive acts of *cities* has been left to the perceptive capacities of this Court. Congress has recently demonstrated once again the accuracy of those predictive powers by the enactment of the Local Government Antitrust Act of 1984 (P.L. 98-554). That Act abolished the troublesome treble damages remedy as to most local entities, while reaffirming and leaving intact the injunctive and other remedies for municipal transgressions of the Sherman Act. Further, the legislative history of that Act clearly reveals that the Congress considered and rejected a number of substantive municipal exemptions, including some strikingly similar to the "public welfare defense" judicially fabricated below.[2]

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[2] For example, H.R.5992, 98th Cong., 2d Sess., Sec. 3 (1984) would have provided that, ". . . the antitrust laws shall not apply to official conduct of a local government reasonably undertaken to protect or provide for the public health, safety or welfare." In contrast, the opinion below seeks to establish a "public welfare defense" (37 Cal.3d at 673, Appendix A at A-28) based upon ". . . a test that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulations." 37 Cal.3d at 674, Appendix A at A-29. This test, like the rejected House proposal of H.R.5992, ". . . encompasses all local actions rationally related to promotion of local health, safety and welfare." *Id.*, at 675, Appendix A at A-31.

In parallel to the House's consideration and rejection of the "public welfare defense" set forth by H.R.5992, *supra*, the Senate considered and rejected S.1578, 98th Cong., 2d Sess. (1984). As reported with amendment on June 15, 1984, Section 2a of the Senate proposal would have provided that the *damage* provisions of the Clayton Act (15 U.S.C. Secs. 15, 15a and 15c), ". . . shall not apply to any law or other action of or official action directed by, a city, . . . or other general function unit of local government in the exercise of its regulatory powers. . . . in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare . . . ." Of similar or broader breadth was the general exclusion offered by H.R.5573, 98th Cong., 2d Sess. (1984), which would have excluded from the application of *all* federal antitrust laws the actions of local government "[I]n the exercise of its regulatory powers . . . where such law or action is valid under state law . . . ." As with S.1578, *supra*, H.R.5573 contained the limitation that *proprietary*

(footnote continues)

Unlike the 51st Congress which enacted the Sherman Act without leaving any express record of intent toward or even consideration of municipal action, the 98th Congress has left a relatively straightforward record of its consideration and rejection of substantive changes in the definition of conduct offending the antitrust laws. The House Judiciary Committee Report to the Committee of the Whole House on H.R.6027, H.R.Rep. 98-965, 98th Cong., 2d Sess. (1984), recites in some detail the proposals placed before the Congress as well as the vast and varied testimony presented to them on the issue. That Report is by no means uncertain as to whether Congress had intended to modify the substantive law:

> H.R.6027 would in no way limit the antitrust immunity for States that the courts have recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent decisions interpreting the "state action" doctrine. *The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, or in enforcement actions by the Department of Justice or the Federal Trade Commission under other statutory provisions.* [*Id.*, at 2 (emphasis added).]

The Report also discusses the urgings for a "municipal rule of reason," strikingly similar to the rule declared below, which was described by Professor Thomas Campbell as follows:

> When a court is presented with a restriction on competition, the Court would engage in a less restrictive alternative analysis * * * [which would] simply require the court to ask, could the unit of local government have achieved its safety, its health, its public welfare objective in a way less retrictive [sic] of the Federal interest in competition, less harmful to the consumer. [*Id.*, at 16.]

(footnote continued)

activities would not be exempted, nor would activities which would be actionable even if state action. This latter limitation was the sole exception to a blanket exclusion that would have been provided by H.R.2981, 98th Cong., 1st Sess. (1983), which would recognize authority vested in the local unit "by any law," presumably reaching not only general home rule statutes and constitutions but even the common law of police power of municipalities.

Finally, the Report reveals the Congressional reasoning which led to the rejection of wholesale substantive exclusions for municipal acts:

> The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* [*Id.*, at 18 (emphasis added).]

It is fair to state, then, that the policy considerations underlying the lower court's opinion, and particularly a "health, safety, welfare" defense limited only by a "less restrictive" means test, have been carefully considered by Congress, and a Congressional judgment has been made that such sweeping changes in substantive application of the laws were not warranted at this time.

Congress by its actions culminating in Public Law 98-544 sent a clear message confirming that it intended generally to preempt anticompetitive municipal conduct lacking a clear state policy foundation. In so doing, it is clear that Congress intended that the existing body of substantive antitrust law continue undisturbed in its application and careful evolution in the federal courts. That body of law contains but two significant components unique to the municipal actor: the *Boulder* exemption, clearly unavailable here, and the as yet unrefined caveat of *Lafayette*'s footnote 48, restated without amplification in *Boulder*'s footnote 20:

> "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." [435 U.S. at 417, n.48; 455 U.S. at 56, n.20.]

This footnote provides the scant soil within which the opinion of the lower court herein is rooted. Typical of the confusion surrounding that dictum, the California court misconstrued this Court's caution about blanket assumptions into a blanket assumption of its own:

> "Anticompetitive conduct by a municipality in exercise of its legitimate police power is indeed of a 'different complexion' than similar conduct engaged in by private business enterprises . . . ." [37 Cal.3d at 663.]

To sanction the conclusion of the lower court would, in this Court's words, "wholly eviscerate" this Court's precedents. *Boulder*, 455 U.S. at 56. For, if a city may fix prices of any and all goods related to "health, safety and welfare" without fear of antitrust scrutiny, what is left of *Lafayette*'s policy protecting federal economic objectives from "parochial" local policy? Can one cut the very heart out of the Sherman Act and pretend it retains vitality? We think not. Whatever may eventually blossom from the concept of "different complexion," the "hard core" of antitrust policy—the prohibition against manipulating the independent setting of price—*must* be kept inviolate or nothing of substance will remain to prevent "[t]he serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws," *Lafayette*, 435 U.S. at 412-413.

B. Rent Control Definitionally Obstructs the Policies and Objectives of the Sherman Act.

The principal objective of the Sherman Act is to prohibit the restraint of free-market price determination and competition. The Berkeley ordinance obstructs the implementation of the procompetitive policies and objectives of the Sherman

Act. State or local enactments are preempted where the state or local program tends to thwart the objectives or policies of federal law. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Under the *Hines* approach to preemption, it is unnecessary to find an actionable combination or conspiracy to find preemption; it is enough that the *object* and *effects* of the scheme be of the kind sought to be controlled by the Sherman Act. This is because a local act is preempted by Congressional action not only where it calls for violation of the *letter* of federal law, but also where the *result* it obtains "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *Jones v. Rath Packing Co., supra*, 430 U.S. 519, 526 (1977). *See also Nash v. Florida Industrial Comm.*, 389 U.S. 235, 239 (1967); *McCulloch v. Maryland*, 4 Wheat. 316, 436, 4 L.Ed. 579, 609 (1819); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *Hill v. Florida*, 325 U.S. 538, 542-543 (1945). Nor does some "different complexion" attach to this price-fixing scheme to save it from preemption. Once divested of the benevolent aura of its municipal actors and subjected to economic analysis, it becomes clear that virtually all of the economic harms which flow from private price-fixing predictably result from this scheme as well. To be sure, the one central characteristic that is distinct from the typical price-fixing scheme is that prices are *suppressed* rather than *supported*, which at first glance produces the predictable reaction that it is innocuous. Yet, as this Court well knows, antitrust policy and analysis is not so facile or unidimensional as to stop there. Congress' policy concerns are not merely limited to or satisfied by the containment of price in any one commodity in any one market. That is because price, as the "central nervous system of the economy," impacts upon all other aspects of the instant commodity or service transaction, and in turn these transactions in the aggregate impact upon the markets for related goods and services. Maximum prices, as well as price floors, have accordingly been repeatedly condemned by this Court as *per se* violations. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Albrecht v. Herald Co.*, 390 U.S. 145 (1969).

The California Legislature has acknowledged the difficulty in attracting investment capital into rental housing in California: California Health and Safety Code Section 51600 declares (as a basis for the state's entry into mortgage financing) that "for reasons of prudent investment policy, private lending institutions are not making mortgage financing available for rental housing developments in California because of the perceived risks such loans entail." Chief among those risks is the threat of local rent control impairing debt service and creditor security. *See*, Bay Area Council, *Rental Housing in California: Obstacles and Opportunities*, April 1983. (Appendix H.) Many other economic studies and publications echo, fairly unanimously, the conclusion that rent controls stifle new supply, encourage deterioration of existing housing stock, and produce negative "ripple effects" in related markets. *See generally* Justice Lucas' thoughtful dissent below, 37 Cal.3d at 715-716 and materials cited therein. That rent controls disrupt normal market operation not only in housing but in related interstate markets as well is too clear to require elaboration.

Rent control definitionally restrains the setting of competitive pricing in a free market. That it would constitute actionable conduct under the Sherman Act if engaged in by private parties is unquestionable. The *result* is in conflict with the policies of the Sherman Act. It is *preempted* thereby even in the absence of a liability-imposing conspiracy for preemption turns upon the obstruction of policy objectives, and not necessarily violation of the letter of the law. As it was explained in this context to the U.S. Senate Judiciary Committee by noted antitrust authority Professor Phillip Areeda:

> It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the federal antitrust regime applies in preference to a federal or state regulatory effort. This is perfectly obvious at the federal level where, for example, a federal court may "invalidate" the regulation or decision of a federal agency because it interferes with competition more than Congress intended and is therefore beyond the authority of the officials in question. Such conclusions are routinely reached without any finding that the federal agency or its officials have violated the antitrust laws or are liable for antitrust treble damages.

> What is often overlooked is that state or local regulation interfering unduly—by whatever standard you choose—with federal policies favoring competition can also be invalidated without any finding of antitrust liability or imposition of treble damages. In its 1980 *Midcal* decision, the Supreme Court affirmed a state court injunction preventing enforcement of a California wine-pricing statute. No antitrust liability was involved, nor was any necessary to invalidate the state-imposed program found to be inconsistent with antitrust law. [Testimony of Phillip Areeda, Official Proceedings of the United States Senate Judiciary Committee, June 30, 1982.]

Municipal price-fixing is preempted by the Sherman Act where it is not entitled to a state's *Parker* exemption, irrespective of whether a plaintiff can establish punishable "combination or conspiracy": *results* not *process* define whether obstruction and "conflict" exist.

IV. VINDICATION OF THE SUPREMACY OF CONGRESSIONAL COMMERCE ENACTMENTS HEREIN POSES NO THREAT TO FEDERALIST PRINCIPLES

Much commentary by municipal law officers and their supporters on the general topic of municipal antitrust has focused upon the supposed federalist status of cities and the hue and cry proclaiming that the inability to defy federal economic policy will destroy the ability of local governments to function.

Both claims sorely miss the mark. This Court has plainly stated that cities enjoy no sovereignty of their own but only that derived from their sovereign states. Those true sovereigns also wield the power and discretion to exempt their creations from antitrust proscriptions simply by making an express policy choice to permit anticompetitive regulation in the particular area of activity. The true intergovernmental tension here—the real political power play—is intrastate, between city and state. The hidden heart of the cities' complaints is that their respective states have not in all cases authorized the excesses of regulatory adventurism in which many (particularly in our own politically tumultuous state of California) have become accustomed to indulging.

"States' rights" are not under attack. In *Parker* a price-fixing scheme adopted by state government was held not to conflict with the Sherman Act since Congress did not apparently intend to require *states* to comply with the antitrust laws in the operation of their own programs. *Lafayette, Boulder,* and *Town of Hallie* have not abridged this deference to state policy; each case has inquired whether the conduct in question involves "a state's control over its officers and agents," *Parker,* 317 U.S. at 351, by looking for sovereign action by the state itself or "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Boulder,* 455 U.S. at 52. The principles enunciated by this Court and urged to be applied herein do not offend "states' rights," as is sometimes loosely said. Rather, they deny cities the "right" as insular self-guiding units to thwart federal policy without some clear indication that a *state* policy is at work. The *states* have voiced no strong objection to such a formulation. Indeed, twenty-three states filed a brief amicus curiae in *Boulder* in favor of petitioner, urging that a state policy requirement be retained. *Boulder, supra,* 455 U.S. 40, 43, 53, n.16. Further, in Congress' recent proceedings culminating in the Local Govern-

ment Antitrust Act of 1984 (P.L. 98-544), the National Conference of State Legislatures sent a representative to Congress to urge retention of the *Boulder* focus on *state* policy making.[3]

The vindication of Congress' economic policies embodied in the Sherman Act does not constitute an affront to the sovereign states themselves, for Congress has wisely left to them the power and discretion to adopt polices displacing the Sherman Act. The rights of cities are not in this context constitutional: they are political. They do not enjoy the independent sovereignty of a state, yet wield significant political power within their state systems, particularly where acting collectively and particularly where a matter of public importance and interest is at stake. The political mechanisms exist, and *work,* to ensure that the dire predictions offered by the champions of municipal omnipotence cannot possibly come to pass. The suggestion that cities cannot properly govern under the shadow of the Sherman Act insults the states as sovereigns—it is the cities, not Congress, who refuse to acknowledge that the state legislatures are competent, sensitive, and trustworthy policymaking bodies.

[3] That representative presented the states' position as follows:

> NSCL's [sic] most important suggested proviso for federal legislation is that the actions of a municipality or county should be eligible for immunity only if they are based on State law. The *Boulder* decision expressly left to the States the power to immunize local activities from federal antitrust liability. NCSL is not in favor of rolling back this portion of the opinion because of our view that in a federal system of dual sovereigns, immunization decisions properly belong to the States and because of our view that this aspect of the *Boulder* decision will not result in an undue burden on local governments. Such a proviso recognizes that local governments are not federal agencies or a third sovereign form of government." Prepared Statement of Dick Hemstad (notation omitted) at Mar. 29, 1984 hearing at p. 3. [Judiciary Committee report on H.R. 6027, H.R. Report No. 98-965, 98th Cong., 2d Sess., August 8, 1984, p. 13, n.19]

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CONCLUSION

This Court and the Congress have, with significant effort, made great strides in resolving the "state action" exemption and the remedies available where that exemption is unavailable. What remains as a puzzle to public and private sectors alike is the question whether political status supersedes economic analysis in determining responsibility for municipal action conflicting with the Sherman Act's policy and objectives. The instant action not only presents that question in a straightforward, dispositive fashion, but it does so compellingly due to the hazards the opinion below presents to the orderly administration of justice.

This Court performs an essential constitutional role in providing uniformity among the lower courts in constitutional matters. It is respectfully submitted this role cannot be served in the best traditions of this Court by permitting sweeping constitutional changes to be made by an inferior court which is by its own admission forced "to wander off the map and travel cross country without the benefit of trail or compass." Opinion below, 37 Cal.3d at 663, Appendix A at A-15. To allow that opinion to stand would make a Pied Piper of that court, luring all lower courts "off the map" of established *stare decisis* as well. It is respectfully urged that this Court afford this matter plenary consideration so that the important federal questions raised herein may become clarified rather than further confused.

Respectfully submitted,

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